(1) That a reparation award is not a judgment and the Commission had no power to enforce its payment (R. 109);

(2) That the only method provided for enforcing payment is a suit for damages brought by the shipper against the carrier in a court of competent jurisdiction (R. 109);

(3) That the carrier did not await the bringing of suit in which it could have asserted its defenses, but, with full knowledge of all the facts and without fraud or duress, paid the award before filing its motion for rehearing, and without a hint or suggestion that the matter would be further litigated (R. 109);

(4) That the carrier's act in voluntarily paying the award, under the circumstances as shown, was to treat the matter as a closed transaction and cause the respondent to believe that the litigation was ended (R. 109);

(5) That respondent was under contract to pay its representative 50 per cent of the amount recovered from the carrier, and when the carrier voluntarily paid the award in full respondent treated it is a closed transaction and paid its representative 50 per cent of the award and used the balance for general corporate purposes, including paying dividends to stockholders (R. 109);

(6) That the carrier paid the award in April, 1929, and did not demand the return of the money until October 30, 1934 (R. 109);

(7) That if the respondent is required at this late date to repay the amount of the award to the carrier it would mean a loss of the sum paid its representative, since the Statute of Limitations would not be a complete bar to any claim respondent might assert against its representative for return of the money (R. 109);

(8) That the voluntary payment of the award prevented respondent from bringing suit for damages in a court of

competent jurisdiction within a year from the date of the award, wherein the rights of the parties could be judicially determined (R. 110);

(9) That these changed conditions were caused by the carrier's voluntary payment of the award and its long wait before demanding the return of the money, and that it would be against equity and good conscience and a rank injustice to require respondent to repay the amount of the award to the carrier, when the carrier's own act in voluntarily paying the award induced respondent to change its position so that it cannot now be placed in statu quo (R. 110).

ARGUMENT.

JURISDICTION.

The Judgment of the State Court Having Been Based in Part on Non-Federal Questions Broad Enough to Maintain the Judgment, This Court Is Without Jurisdiction.

The cases cited in petitioners' brief to sustain the jurisdiction of this Court are cases where the sole question involved was construction of a federal statute, and the decisions reviewed did not rest, either in whole or in part, on matters of general law.

Petitioner's original action was brought in the state court of Missouri to recover on a count for money had and received, and the defendant, among other defenses, pleaded voluntary payment, estoppel and changed condition.

The judgment of the Supreme Court of Missouri holds (1) that the payments made were voluntary, and (2) that the payments were made under circumstances which estopped petitioners from recovering, and that under the facts it would be inequitable and unjust to require the defendant to pay the money to petitioners.

It is respondent's view that what constitutes a voluntary payment is a matter of general law and does not necessarily depend upon the construction of Section 16 of the Interstate Commerce Act (United States Code, Title 49, Section 16). In Missouri the rule is firmly established that a payment is voluntary unless made under immediate necessity to redeem or preserve one's person or goods, and that a threat to sue does not constitute duress.

Claflin et al. v. McDonough, 33 Mo. 412;
Wolfe et al. v. Marshal et al., 52 Mo. 167;
State ex rel. Sandburn v. Stonestreet, 92 Mo. App. 214;

Pritchard v. Peoples Bank of Holcomb, 198 Mo. App. 597, 200 S. W. 665.

The second syllabus in Claflin v. McDonough, supra, illustrates the rule in Missouri:

> "Threat of legal process is not duress, for the party may plead and make proof that he is not liable. Where the collector demanded of the defendants the amount of the license tax due by them as merchants, and threatened that if they refused payment they should be prosecuted by indictment for dealing as merchants without license, and the defendants thereupon paid the sum demanded under protest in writing, the payment was voluntary, and not under duress."

The second ground on which the lower court based its judgment was that under the facts and circumstances as shown by the record in this case the petitioners are estopped from recovering because of having induced respondent to treat the matter as a closed transaction after it had paid the reparation. In the opinion of the Supreme Court of Missouri it is said (R. 109, 110):

> "The effect of the carrier's act in voluntarily paying the award under the circumstances shown was to treat the matter as a closed transaction, and cause respondent to believe that the litigation was ended.
>
> "Respondent was under contract to pay its representative fifty per cent of the amount recovered from the carrier. When the carrier voluntarily paid the award in full, respondent treated the case as a closed transaction and paid its representative ($11,997.16) fifty per cent of the award, and used the balance for its general corporate purposes, including payment of dividends to its stockholders. The carrier paid the award in April, 1929, and did not demand return of the money until October 30, 1934. If respondent were required, at this late date, to repay the amount of the award to the carrier, it would mean

a loss to respondent of the $11,997.16 which it paid to its representative, since the Statute of Limitations would now be a complete bar to any claim respondent might assert against its representative for the return of the money. Furthermore, respondent would be deprived of his statutory right to have some court determine the validity of its claim against the carrier, since the carrier's voluntary payment of the award prevented respondent from bringing a suit for damages in a court of competent jurisdiction, within one year from the date of the award, wherein the rights of the parties could have been judicially determined.

"The record justifies the conclusion that the carrier's voluntary payment of the award caused respondent to believe that the matter was a closed transaction, and induced it to act on that belief and thus alter its position by paying to its representative fifty per cent of the award. * * * These changed conditions were caused by the carrier's voluntary payment of the award, and its long wait thereafter before demanding return of the money so paid. It would be against equity and good conscience and a rank injustice to require respondent to repay the amount of the award to the carrier when the carrier's own act in voluntarily paying the award induced respondent to change its postion so that it cannot now be placed in statu quo."

It is respondent's view that the opinion of the Supreme Court of Missouri shows on its face that its judgment rests, at least in part, on a nonfederal question broad enough to sustain its judgment, and that under such circumstances this Court is without jurisdiction.

In Arkansas Southern Railroad Company v. German National Bank, 207 U. S. 270, 28 S. Ct. 78, 52 L. Ed. 201, the Court said:

"But, according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was neces-

sary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. (Cases cited.) Therefore, if we should be of opinion, as we are, that the supreme court rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether in our opinion, its views were right or wrong."

In Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644, this Court, speaking on this question, said:

"Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the nonfederal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. (Cases cited.) It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. (Cases cited.)"

I.

The Supreme Court of Missouri Held That the Payment of the Award of Reparation in Question to Respondent Pursuant to Orders of the Interstate Commerce Commission Entered in Accordance With the Provisions of Section 16 of the Act (U. S. Code, Title 49, Section 16), Without Suit Having Been Brought by the Respondent to Enforce Such Orders of the Commission, Was Voluntary and Could Not Be Recovered, Though Such Orders Had Thereafter Been Set Aside by the Commission.

The holding of the Missouri Supreme Court that a reparation award made by the Interstate Commerce Commission was not a judgment, and that such Commission could not enforce its payment, and that if the carrier did not pay the award the shipper may bring a suit against the carrier to recover damages, and that in such suit the order of the Commission should be prima facie evidence of the facts therein stated, and that in such suit it could invoke every defense which the law afforded it, is in harmony with the construction placed upon Section 16 of the Interstate Commerce Act (U. S. Code, Title 49, Section 16) by this Court.

In the case of Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412, 35 S. Ct. 328, 59 L. Ed. 644, l. c. 657, it is said:

> "It is also urged, as it was in the courts below, that the provision in section 16 that, in actions like this, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.
>
> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no ob-

stacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained."

The petitioners apparently contend that after the finding by the Interstate Commerce Commission a payment of reparation by the carrier is made under duress, and therefore the payment is not voluntary because of the limited character of defense the carrier could make in such action, provided there was evidence to support the finding and order of the Commission, and provided the rates fixed are not confiscatory. However, the record does not disclose what testimony, if any, was offered before the Commission to support its finding, nor whether or not the rates were in fact confiscatory. It is therefore suggested that, in so far as the record discloses, the shipper had open to it defenses, (a) lack of testimony to support the finding and order of the Commission; (b) the fact and amount of damage, and (c) the question of confiscation.

The rule of law in Missouri as to what constitutes voluntary payment has heretofore been discussed under the question of jurisdiction. Under those authorities the payment by petitioners was a voluntary payment.

The court below did not hold that, had respondent instituted suit to collect the award of damages in question, the carrier could have tried out the reasonableness of the rates assailed, but held that where rates found by a regulatory body to be compensatory were attacked as being

confiscatory, courts may inquire into the method by which its conclusions were reached (R. 107).

Some of the facts in the record relative to the circumstances under which the payment was made by the carrier to the respondent appear from the testimony of B. V. Forrester, one of respondent's witnesses. His testimony is as follows (R. 88):

> "Q. Wish you would state just what you said to Mr. Perkins and what Mr. Perkins said to you relative to the payment of reparation, as far as you can recall.
>
> A. I asked Mr. Perkins about the payment of the reparation. At the time the order was near at hand, and Mr. Perkins said that Mr. Larimore had been handling the reparation in this particular case and he wasn't very familiar with it, and then Mr. Perkins asked me what the Frisco had done about it and I told him that Mr. Kurn had agreed, or rather had ordered, the reparation paid, and he said, 'Well, whatever the Frisco had done, the Missouri Pacific will do likewise.'
>
> Q. Who was Mr. Kurn?
>
> A. President of the Frisco Lines.
>
> Q. Now, did you have any further conference with anyone connected with the Missouri Pacific after that time relative to the payment of reparation as ordered?
>
> A. No, other than I assisted the auditing department in handling Form 5 statement."

In view of the foregoing testimony it would appear that the lower court was justified in concluding and stating in its opinion that the carrier did voluntarily pay the award, without hint or suggestion to respondent that the matter would be further litigated, and the record clearly shows that the award was paid before motion for rehearing was filed (R. 26).

When Mr. Perkins, the vice-president of the carrier company, stated that his company's action would be gov-

erned by what a competitive line did, it seems clear that the payments made were not involuntary, as the result of coercion or duress, but, rather, a voluntary act.

II.

The Supreme Court of Missouri Held, in Construing Said Section 16 of the Act, That the Carrier Should Have Refused to Pay the Award Entered by the Commission and Awaited a Suit by the Shipper, in Which Suit It could Have Invoked Every Defense Which the Law Afforded It, and That the Payment of the Award Before Filing Motion for Rehearing Before the Commission and Without Suit Having Been Brought, Was a Voluntary Payment and Could Not Be Recovered, Although Such Orders by the Commission Had Thereafter Been Set Aside by the Body.

The above statement is the second reason relied on for the allowance of the writ, as set out in petitioners' petition filed herein.

The same has not been restated for the reason that it is a correct statement of the holding of the lower court, but apparently is a repetition in slightly different language of the proposition stated in reason number I assigned in petitioners' petition, and therefore what we have said with respect to question number 1 in paragraph number 1 of this argument is equally applicable here and will not be repeated.

III.

The Supreme Court of Missouri Also Held That Payment of the Award in Question Without Waiting for Suit to Be Brought Thereon Was Not a Payment Under a Mistake of Fact, but Was a Payment Voluntarily Made, With Full Knowledge of All the Facts, and Could Not Be Recovered by Petitioners, Although the Award in Question Had Been Set Aside by the Commission.

The above is the third reason assigned in the petition of petitioners for the allowance of the writ, but it is discussed in petitioners' brief under [illegible] of their argument. Respondent does not contend that the reasonableness or unreasonableness of a rate charged by a railroad company is not a question of fact, and the Court did not so hold. The court below did not hold that the reasonableness or unreasonableness of a rate charged was not a question of fact, but did hold:

> "A mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact."

In the trial court petitioners did not seek to recover on the ground of mutual mistake of fact, but, rather, based their cause of action on the proposition that the Interstate Commerce Commission had legal authority to make reparation awards and to enforce the same and alleged that the railroad company had no appeal, and, having no alternative, was required to and did pay to the defendant (R. 9). In the trial court the petitioners did not raise the question of the payment being made under mutual mistake of fact, as appears from the declarations of law tendered (R. 90, 91, 92, 93 and 94), and their motion for new trial (R. 97, 98 and 99). The question as to whether or not there was a mutual mistake of fact, not having been

raised, was not essential to a decision of the case nor determinative of it, and, in addition thereto, the determination as to whether or not the payment was made under a mutual mistake of fact would appear to be a matter of general law and not in any sense a federal question to be determined by a construction or interpretation of any federal statute.

IV.

The Supreme Court of Missouri Held That Since, in Its Opinion, the Payment of the Award in Question Was Voluntary, Such Payment Caused Respondent to Believe That the Matter Was a Closed Transaction and That It Would Be Inequitable to Require Respondent to Refund the Amount So Paid, Even Though the Commission Had Set Aside the Award of Reparation and All Orders Requiring the Payment Thereof, Because the Respondent Could Not Be Placed in Statu Quo.

Under this heading respondent will discuss the fourth reason set out in petitioners' petition for the allowance of the writ, which seems to be treated under points III and IV of petitioners' argument.

An analysis of the opinion of the lower court would apparently lead to the conclusion that the Court's decision was primarily based on the proposition that the circumstances surrounding the payments were such as to estop the petitioners from recovering because their conduct had been such as to cause the respondent to believe that the transaction was closed, and that the respondent had changed its position so that it could not be placed in statu quo, and that it would be inequitable and unjust to require restitution. An action for restitution is an action for money had and received and to which equitable defenses may be interposed. The holding of the Supreme

Court of Missouri that petitioners could not recover because of respondent's changed condition due to the action and conduct of petitioners, and that it would be inequitable and unjust to require a restitution, is in harmony with the decisions of the courts of last resort in that state. On this question the lower court said (R. 109):

> "In an action for money had and received the plaintiff is entitled to recover if, under the facts shown, it would be contrary to equity and good conscience for the defendant to retain the money. The converse of the rule is also true. In such an action the plaintiff cannot recover if it appears from the facts that it would be inequitable and unjust to compel defendant to return the money. Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873; Bull v. United States, 295 U. S. 247; Atlantic Coast Line Railroad Company v. Florida, 79 L. Ed. 1451; 41 C. J., p. 51, Sec. 39."

The decision of the lower court appears to be in harmony with the decisions of this Court. In the case of Atlantic Coast Line Railroad Company v. Florida, 295 U. S. 301, 55 S. Ct. 713, 79 L. Ed. 1451, the Court said:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (Cases cited.) The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. (Cases cited.) The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. (Cases cited.)"

It is the view of the respondent that whether it would be equitable for respondent to retain the money does not depend in this case upon the construction of any section

of the Commerce Act, but depends upon the facts and circumstances under which the payment is made, and those facts and circumstances were found by the lower court to be such as to make it inequitable and unjust to require restitution by the respondent.

CONCLUSION.

It is therefore respectfully submitted that this cause is not one within the jurisdiction of this Court, for the reason that the decision of the lower court rested, at least in part, on matters of general law sufficiently broad to sustain its judgment, and it is further submitted that the decision of the lower court, in so far as it construes Section 16 of the Commerce Act, construed the same in harmony with the decisions of this Court, and that petitioners' petition and brief present no peculiar reasons or circumstances which would necessitate or cause this Court to grant its writ herein, and the same should be denied.

R. F. BAYNES,
Counsel for Respondent.

Of Counsel:

RALPH E. BAILEY,
ROGER BAILEY,
JAMES A. FINCH,
JAMES A. FINCH, JR.